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No. 92-144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NEW YORK SHIPPING ASSOCIATION, INC., AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Local 1814 of the International Longshoremen's Association, AFL-CIO, submits this brief in reply to the briefs in opposition to the petition filed by Respondents the United States of America and New York Shipping Association, Inc. ("NYSA").[1]

[1] NYSA filed its opposing brief ("NYSA Br.") on August 21, 1992. The government, after having been granted two extensions of time, filed its brief ("Govt. Br.") on October 7, 1992.

I
The Local 1814 Consent Decree Does Not Abrogate The Norris-LaGuardia Act

In an attempt to divert this Court's attention from the real reasons for granting the writ the government makes an argument that somehow escaped the notice of the United States Attorney below, NYSA, the district court, and the court of appeals. Invoking the rule that the judgment can be defended on any ground that the law and record allow, Govt. Br. at 13, n. 5, the government claims that this case is unworthy of review because Local 1814 by entering into a consent decree which enjoins its members from associating with organized crime has removed from its collective bargaining agreement with NYSA the very issue which it is enjoined from arbitrating. *See* Govt. Br. at 12-13. The government characterizes the injunction as merely complementing "the provisions of petitioner's consent decree that permanently bars members from associating with organized crime." Govt. Br. at 5, n. 3.

This cleverness of this argument is, unfortunately for the government, sapped of all vitality by the facts. It is based upon a superficial knowledge of the case and a shallow grasp of the issues.[2] The fact is that the NYSA-government consent decree by its terms is not limited to Local 1814 members but is intended to apply to *all* ILA members in the port, even those whose locals were never parties in the RICO case and those who settled on different terms than Local 1814. Consequently petitioner brought the arbitration, the action in the district court, and the appeal on behalf of its members and of all other ILA locals in the port and their members. *See* Petition at 9.

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[2] The government's brief abounds in misstatements. It claims that members of NYSA were "charged with various offenses," *see* Govt. Br. at 3, n. 2, which is not true. NYSA was named as a defendant solely to give the government relief. *See* Pet. App. A-4. The government further claims that under the proposed consent decree NYSA may apply to the district court to have persons placed on the blacklist. Govt. Br. at 4. This is an error. The consent decree says only that the government may provide to NYSA a list of persons to be barred from waterfront employment. *See* Pet. App. at A-6.

The district court recognized the scope of the case. In the portions of his oral opinion quoted by the court of appeals, Judge Sand constantly refers to "Local 1814 and the International" Pet. App. at A-10, A-11, "the unions" (plural), Pet. App. at A-12, A-13, "Local 1814 and the associated unions," Pet. App. A-14. Thus, whatever may be the case with respect to Local 1814 members (and the union's power to waive their rights is not free from question), there has certainly been no waiver or "removal" from the contract with respect to the rights of the rest of the thousands of ILA-represented NYSA employees in the port.

Moreover, even with respect to Local 1814 members, the consent decree merely enjoins them from associating with organized crime. It does not forfeit their employment or their arbitration rights under the collective bargaining agreement. The remedy for disobedience of the consent decree would be a contempt proceeding in the district court or a proceeding before the Monitor appointed to enforce the consent decree. The government's argument cavalierly suggests still a third layer of enforcement mechanisms against persons who were not even important enough to be named among the 54 defendants in the RICO action.

II
The Second Circuit Has Rendered A Decision On An Important Issue of Federal Law Which Conflicts With The Decisions Of This Court And Of Other Courts of Appeals

Both the government and NYSA attempt to denigrate the significance of the Second Circuit's decision by claiming that it is merely one more application of established principles in harmonizing conflicting federal laws. *See* Govt. Br. at 9-12, NYSA Br. at 11-14. Both urge a myopic view which would limit inquiry to whether this Court or any circuit court has ever held that the Norris-LaGuardia Act ("NLGA") can not be accommodated to the Racketeer Influenced and Corrupt Organizations Act ("RICO"). This misses the point.

The Second Circuit decision does not conflict with other decisions on minutiae or details. The conflict lies with three well-established principles. First, the NLGA may not be accommodated to non-labor statutes. *See* Petition at 16-22. Neither respondent comes to grips with the issue. The government merely dismisses these holdings as not involving RICO. *See* Govt. Br. at 11-12.[3] However, these holdings do limit accommodation of the NLGA to labor statutes, a class into which RICO does not fall. The Second Circuit's decision going outside the class necessarily conflicts with the other precedent.

NYSA claims that there is a "wealth of authority" subordinating the NLGA to other non-labor enactments. *See* NYSA Br. at 13.

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[3] It would seem that even this argument is on shaky ground. In a decision rendered after the filing of the petition in this case, the Eighth Circuit has held that RICO is preempted by the National Labor Relations Act. *Brennan v. Chestnut*, 1992 WL 200284 (8th Cir. August 21, 1992). *See also Butchers' Union, Local 498 v. SDC Investment, Inc.*, 631 F.Supp. 1001 (E.D. Cal. 1986). Two days before the government filed its brief in this case this Court summarily vacated a holding of the Second Circuit that RICO was not preempted by the NLRA. *See Yellow Freight System, Inc. v. United States*, 1992 WL 127139, 60 U.S.L.W. 3843 (U.S. Oct. 5, 1992). Although the Court directed that *Yellow Freight* be dismissed as moot, it seemed to go out of its way to vacate the Second Circuit's decision, since the same result could have been accomplished by a simple denial of certiorari.

But the cases NYSA cites all arise under the shipping laws and anti-trust laws, where there is a labor exemption. Once that threshold barrier is overcome and it is held that the labor exemption does not preclude the litigation, it is clear that the case is not truly a "labor dispute" so that the NLGA does not apply. Moreover, NYSA's chief authority is not even a court but only the Federal Maritime Commission, and the Commission's statement quoted by NYSA is mere *ipse dixit* without any citation of authority.[4] True, the FMC was upheld on review by the District of Columbia Circuit, but nowhere does the court of appeals in its 35 page decision mention the NLGA much less support the FMC's restrictive view.

The District of Columbia Circuit's opinion is instructive, however, with respect to the second principle violated by the Second Circuit. The District of Columbia Circuit notes that in harmonizing federal statutes, there must be a real, not a false, conflict between them before one can be made to give way. A false conflict exists where violation of one statute is not really required by the other. *See New York Shipping Ass'n*, 854 F.2d at 1367-8.[5]

The Second Circuit's error was to rely upon a false conflict. The Court of Appeals found an antagonism between the NLGA and RICO where none exists. Nothing in RICO requires NYSA to buy its way out of the lawsuit by giving up its employees' rights. Nothing requires the district court to grant the particular relief embodied in the proposed consent decree. None of the acts qualifying an

[4] *See 50 Mile Container Rules*, 21 Shp'g Reg. Rep. (P&F), 544, at 559 (FMC 1982), *pet. for review denied sub nom, New York Shipping Ass'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989).

[5] This principle is embodied in quotes from this Court's opinions by both respondents, who then quickly disregard it. The government says

> ". . . the Norris-LaGuardia Act does not apply to labor disputes "in limited situations where *necessary* to accommodate the Act to specific federal legislation or paramount congressional policy." *Jacksonville Bulk Terminals*, 457 U.S. at 707-708.

Govt. Br. at 10 (*emphasis supplied*). NYSA says

> The NLGA is no stranger to the process of statutory reconciliation. "The prohibition of the NLGA must give way when *necessary* to enforce a *duty specifically imposed* by another statute." *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 514 (1989).

NYSA Br. at 13-14 (*emphasis supplied*).

employee for the blacklist is a RICO violation. No duty specifically imposed by RICO is involved. The party to the proposed consent decree, NYSA, is not alleged to have violated RICO; it is only in the case to permit the government to get relief it might otherwise lack. The arbitration award sought by the unions would not limit or impinge upon the jurisdiction of the district court, only upon NYSA's power to consent to relief that violates its contractual obligations. There is, then, no basis for harmonization. The Second Circuit, in defiance of all previous authority, has expanded accommodation to apply where it is not required by the competing statute but is only a tool sought by the government to achieve some general statutory purpose.[6]

The third principle which the court of appeals violates is the strong public policy in labor law favoring arbitration. The government, in addition to mistakenly raising the Local 1814 Consent Decree, claims that the policy favoring arbitration is of little concern here because arbitration is not itemized as a protected activity in § 4 of the NLGA. *See* Govt. Br. at 10, n. 14. However, as two courts of appeals have pointed out, the omission of arbitration in § 4 is because § 8 of the NLGA positively *requires* resort to arbitration before any injunctive relief can be granted. Therefore, there was no reason for Congress to cross-reference this requirement in § 4. *Camping Construction Co. v. District Council of Iron Workers,* 915 F.2d 1333, 1345-46 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1684 (1991); *In re District No. 1—Pacific Coast Dist. Marine Eng'rs' Beneficial Ass'n,* 723 F.2d 70, 74-75 at n. 2, 81 (D.C. Cir. 1983).[7]

NYSA, in all wide-eyed innocence, claims that it is doing no more in the consent decree than agreeing to obey a court order, which it is bound to do anyway, and that, therefore, there is no ripe

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[6] The government claims this is but an exception to the NLGA. *See* Govt. Br. at 11. This merely reenforces petitioner's argument that any new exception should be reviewed by this Court. *See* Petition at 22-23.

[7] This Court has held that neither § 1 nor § 8 is in any way modified by § 4. *See, e.g., Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27 v. Toledo, Peoria & Western Railroad*, 321 U.S. 50 (1944) (holding that an employer who refuses to submit a dispute to arbitration has not made "every reasonable effort" to settle the dispute, within the meaning of § 8 of the Norris-LaGuardia Act, and is therefore barred from injunctive relief in the federal courts).

labor dispute or arbitrable question until such time as the consent decree is in place and enforced in a specific instance. *See* NYSA Br. at 15-18. This argument overlooks the obvious fact that, quite apart from the district court's power to grant relief absent a consent decree, it is a matter of history that it is NYSA in its agreement with the government that is suggesting, urging, inspiring the court to grant the relief. It is this affirmative conduct that the unions claim breach their collective bargaining agreement and must be arbitrated. Neither the United States Attorney below, the district court, nor the Second Circuit bought NYSA's "unripeness" canard. NYSA's hope that this Court will be more gullible is mere wishful thinking.

Finally, both respondents seek to minimize another factor that calls for review by this Court — the adoption by the courts below of an "end justifies the means" approach to get at organized crime, a crushing of all other principles of law under the RICO juggernaut. While pooh-poohing this aspect of the case, *see* Govt. Br. at 13-14, the government opens its brief with an attempt to poison the well by citing stale reports as to the connection between organized crime and the New York-New Jersey Waterfront, — reports based on information outside the record in the case and compiled without the protection of the rules of evidence. Whatever probative value they may have, the government's resort to these reports is a transparent pitch to this Court to put on the white hats, go after the bad guys, and wink at the abuses of the lower courts in the interest of the higher purpose of fighting crime.

Petitioner does not bring this case for the benefit of the few of its members that might have organized crime connections but for all the honest longshoremen in the port whose collectively bargained rights are in jeopardy. It is to oppose the principle adopted by the government and the lower courts, that settled rules of law can be jettisoned when the object is to root out crime. This attitude does not harm only the criminals but sacrifices all citizens who have the right to expect that federal judges, of all people, will uphold the law. The equal application of justice even to those who may not deserve it is the shield of everyone. When exceptions can be made because of

some perceived virtue in a particular case, the rights of all are diminished. NYSA and society at large would do well to continue reading to the end the John Donne poem NYSA quotes to this Court at pages 12 of its brief:

> . . . never send to know for whom the bell tolls;
> It tolls for thee.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 14, 1992

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